

the issuing savings associations a certification as to the sale stating that to the knowledge of the underwriter no beneficial owner or owners of the Eurodollar certificate(s) or participants therein is a United States person; and, further, that the underwriter has not knowingly sold or offered for sale and will not sell or offer for sale, the Eurodollar certificate(s) or participations therein to any United States person.

(3) Upon issuance of any certificate under this section, the issuing savings association shall provide to the Office such information as the Office deems necessary to monitor effectively the use of the authority provided by this section.

(e) *Requirements as to certificates.* Each Eurodollar certificate and participation, including a temporary Eurodollar certificate or participation, shall bear on its face, in boldface type, a legend substantially in the following form:

This Eurodollar certificate has been issued pursuant to a regulation of the Office of Thrift Supervision, an agency of the United States government, which requires that the Eurodollar certificate be sold, and interest at the amount stated hereon paid, only to purchasers who are not United States nationals or residents, and may not be offered directly or indirectly or sold in the United States of America, its territories or possessions, or to persons who are nationals or residents thereof.

(f) *Pooling of certificates.* A savings association may engage in pooling or participate in pooling funds, or soliciting or promoting pooled accounts, in connection with the issuance of a Eurodollar certificate in conformity with this section.

[54 FR 49552, Nov. 30, 1989, as amended at 60 FR 66718, Dec. 26, 1995]

**§ 563.10 Earnings-based accounts.**

(a) *Definition.* An earnings-based account is any account that provides for the payment of interest which is determined, to any extent, directly or indirectly, with reference to an index based upon the profitability, earnings, cash-flow, appreciation, or other form of return on assets which are, directly or indirectly, owned by or under or within the control of the savings association ("contingent interest"): *Provided*, That earnings-based instruments are not is-

sued accounts (as provided in § 545.11 of this chapter) if:

(1) The fixed or guaranteed portion of the interest or return on such instruments is less than 66.667 percent of the average yield for AAA-rated corporate bonds ("Moody's seasoned") published in the issue of the Federal Reserve Board publication H15 (519) "Selected Interest Rates" most recently preceding the date of issuance of such instruments;

(2) The instruments grant the investor an ownership interest of any kind, other than a security interest arising from operation of law, in such assets; or

(3) The instruments put the investor's funds at risk by providing for negative interest or by limiting the obligation to repay principal on the basis of asset performance.

(b) *Limitations.* If authorized by applicable state law, a savings association may issue earnings-based accounts only in accordance with the following conditions:

(1) The total outstanding amount of all such accounts issued by the savings association may not, as of the date of the issuance of any earnings-based account, exceed an amount equal to five percent of the savings association's assets, except that such amount may be increased to 20 percent of the savings association's assets with prior permission of the OTS pursuant to paragraph (c) of this section;

(2) The savings association is in compliance with its capital requirements under part 567 of this subchapter;

(3) Assets the income or return on which is the basis for the index used in the accounts may only be loans secured by real property;

(4) Only the savings association, and no other person, may exercise control over the selection or disposition of assets upon which the index is based or assets otherwise acquired in connection with the issuance of such accounts;

(5) No savings association or its agents shall, directly or indirectly:

(i) Employ any device, scheme, or artifice to defraud,

(ii) Make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading, or

(iii) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person, in connection with the sale or issuance of any earnings-based account;

(iv) *Provided*, That the defenses available to an action under section 10b of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) shall be available to any person subject to an action under this paragraph (b)(5);

(6) A savings association may not pay or commit to pay contingent interest in an amount greater than the amount of gross receipts, other than amounts attributable to repayment of principal, derived from the assets the return on which the interest index is based;

(7) The maturity, acceleration of maturity, mandatory redemption, or similar right or option with respect to an earnings-based account may not be conditioned upon the financial condition of the savings association or upon any supervisory or other regulatory action, including, but not limited to, the appointment of a conservator or receiver, with respect to such savings association;

(8) No savings association shall issue, sell, or otherwise participate in the distribution of any earnings-based account the sale of which is accompanied by a security or right to purchase a security; and

(9) The issuing savings association shall use all reasonable means to ensure that persons who hold or have a beneficial interest in such accounts do not have an interest of any kind in the assets used to calculate the contingent interest. Such means include, but are not limited to, the inclusion of an appropriate legend on the face of the account certificates.

(c) *Permission for increased issuance.*

(1) The OTS may grant permission to a savings association to issue earnings-based accounts in an amount of up to 20 percent of the savings association's assets, upon consideration by the OTS of the following factors:

(i) Whether the savings association meets or exceeds the capital requirements specified in part 567 of this chapter or any amount of capital required to be maintained in an applicable supervisory directive or operating agreement;

(ii) Whether the savings association has increased its total liabilities at an annual rate of greater than 25 percent during any three-month period in the 12 months preceding the date of application;

(iii) Whether the savings association's underwriting experience indicates an ability to adequately underwrite the loans anticipated to be used in calculating the index under the program;

(iv) Whether the savings association meets the asset-composition test imposed on a savings association seeking to qualify as a "domestic building and loan association" pursuant to section 7701(a)(19) of the Internal Revenue Code of 1954 (as amended);

(v) Whether there are no other bases for supervisory concern with respect to such savings association; and

(vi) Whether, under the terms of the issuance in question, and in fact, the savings association would retain a substantial economic interest in the indexed assets in proportion to the risks attending such issuance.

(2) Permission shall be deemed granted by the OTS 30 days after notification to the applicant that such application is complete, unless the applicant receives written notice from the OTS within such period that objection has been taken.

(3) An application shall be deemed to be complete for purposes of this section when the OTS has received the following items:

(i) A description of the anticipated and the maximum amounts of earnings-based accounts to be offered by the applicant;

(ii) Information describing in detail the loans to be used in calculating the contingent interest on the certificates;

(iii) A description and analysis of the savings association's underwriting and credit experience in the making of such loans;

(iv) The exact method of calculating contingent interest on the certificates;

(v) Information showing the financial condition of the applicant including, but not limited to, the applicant's capital adequacy (under part 567 of this chapter and paragraph (c)(1)(i) of this section);

(vi) A detailed analysis showing the extent to which the proposed offering would affect the applicant's exposure to interest-rate and credit risk;

(vii) Information describing the applicant's deposit growth over the preceding three calendar years; and

(viii) A copy of a resolution adopted by the applicant's board of directors establishing a plan of operations designed, in conjunction with the offering, to reduce interest-rate and credit risk to the savings association.

(d) *Effective date.* This section shall be effective with respect to any instruments issued or sold on or after October 17, 1984, except that it shall not apply to accounts issued after such date under an earnings-based-accounts program for which a savings association had, prior to such date, received written notice of intent not to object to such issuance from the OTS.

[54 FR 49552, Nov. 30, 1989, as amended at 55 FR 13514, Apr. 11, 1990; 57 FR 14344, Apr. 20, 1992; 57 FR 33438, July 29, 1992; 59 FR 66159, Dec. 23, 1994]

## Subpart B—Operation and Structure

### § 563.22 Merger, consolidation, purchase or sale of assets, or assumption of liabilities.

(a) No savings association may, without application to and approval by the Office:

(1) Combine with any insured depository institution, if the acquiring or resulting institution is to be a savings association; or

(2) Assume liability to pay any deposit made in, any insured depository institution.

(b)(1) No savings association may, without notifying the Office, as provided in paragraph (h)(1) of this section:

(i) Combine with another insured depository institution where a savings association is not the resulting institution; or

(ii) In the case of a savings association that meets the conditions for expedited treatment under § 516.3(a) of this chapter, convert, directly or indirectly, to a national or state bank.

(2) No savings association that does not meet the conditions for expedited treatment under § 516.3(a) of this chapter may, directly or indirectly, convert to a national or state bank without prior application to and approval of the Office, as provided in paragraph (h)(2)(ii) of this section.

(c) No savings association may make any transfer (excluding transfers subject to paragraphs (a) or (b) of this section) without notice or application to the Office, as provided in paragraph (h)(2) of this section. For purposes of this paragraph, the term "transfer" means purchases or sales of assets or liabilities in bulk not made in the ordinary course of business including, but not limited to, transfers of assets or savings account liabilities, purchases of assets, and assumptions of deposit accounts or other liabilities, and combinations with a depository institution other than an insured depository institution.

(d)(1) In determining whether to confer approval for a transaction under paragraphs (a), (b)(2), or (c) of this section, the Office shall take into account the following:

(i) The capital level of any resulting savings association;

(ii) The financial and managerial resources of the constituent institutions;

(iii) The future prospects of the constituent institutions;

(iv) The convenience and needs of the communities to be served;

(v) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(vi) Factors relating to the fairness of and disclosure concerning the transaction, including, but not limited to:

(A) *Equitable treatment.* The transaction should be equitable to all concerned—savings account holders, borrowers, creditors and stockholders (if any) of each savings association—giving proper recognition of and protection to their respective legal rights and interests. The transaction will be closely reviewed for fairness where the transaction does not appear to be the